88-294 (1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GUYS & DOLLS, INC.,

Petitioner,

v.

JOHN E. MCHALE, JR., etc., et. al,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a Defendant, in a complex civil rights case involving a multitude of witnesses, has carried its burden of production by filing a Summary Judgment Motion that is supported only by materials that do not negate the Plaintiffs claim.

B. Whether it was clearly erroneous to conclude, on a motion for Summary Judgment, that a corporate Plaintiff could not produce any evidence to support its claim, where the court had precluded only one shareholder from presenting evidence at trial.

C. Whether it was clearly erroneous for the lower court to grant Summary Judgment against a Plaintiff who filed no counter affidavits, where the court granted a protective order preventing Plaintiff from discovery through deposition of Defendants.

D. Whether it was clearly erroneous for the lower court to grant a protective order against one Plaintiff because of another Plaintiff's discovery violations

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit Court in No. 87-1619 is reprinted on page 49, herein.

The opinion of the U.S. District Court for the District of Maryland in Civil Action No. JFM-84-3859 is reprinted on page 63, herein.

GROUNDS OF JURISDICTION

28 U.S.C. 1254 confers upon the Supreme Court of the United States the jurisdiction to entertain this petition for writ of certiorari.

TEXT, RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

(A) FOR CLAIMANT

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(B) FOR DEFENDING PARTY

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(C) MOTION AND PROCEEDINGS THEREON

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) CASE NOT FULLY ADJUDICATED ON MOTION

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is

necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible

in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached hereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment,

if appropriate, shall be entered against the adverse party.

(F) WHEN AFFIDAVITS ARE UNAVAILABLE

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(G) AFFIDAVITS MADE IN BAD FAITH

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the

other party the amount of the reasonable expenses which the filing of the affidavit caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

Plaintiff Guys & Dolls, Inc.,[1] along with two other Plaintiffs, Joe Champion and Kay Champion, sued Defendants Prince George's County and some twenty-odd individuals, Prince George's County Police Officers, both active and retired. The Plaintiff alleged in their Third Amended Complaint that the Defendants conspired to harass and intimidate the customers and employees of Guys and Dolls Billiards, a pool hall owned and operated by the Plaintiff Guys and Dolls, Inc., in an attempt to force the business to close. Guys and Dolls, Inc., is owned by Plaintiffs Joseph Champion and Kay Champion.

The court below granted a Defendants'

1. Guys and Dolls Billiards, Inc., has no parent companies, subsidiaries, or affiliates.

Motion for Summary Judgment, on the grounds that the Plaintiffs could not produce any evidence to support their claims. It was from that 16 April 1987 order of the lower court, granting Summary Judgment against Guys & Dolls, Inc., that an appeal was taken. The Court of Appeals for the Fourth Circuit affirmed.

In the Plaintiff's Complaint, of some 22 pages and over sixty paragraphs, the Plaintiffs named nineteen civilian witnesses, who had been subjected to the illegal acts of the Defendant officers. None of the parties to this action have yet taken the depositions of these nineteen civilian witnesses.

Discovery proceeded slowly. In December of 1986, counsel for the Defendants became aware of a discovery violation by one

Plaintiff, Joseph Champion, who had failed to comply with the lower court's discovery order. Counsel for the Defendant then filed a Motion to Dismiss the Plaintiffs' Complaint and filed a Motion for Protective order, requesting that the court relieve the Defendants from attendance at depostions previously scheduled by al three Plaintiffs. The Defendants did not attend the depositions, despite the fact that the court had not yet granted their motion for protective order.

The lower court, in January of 1987, determined that one Plaintiff, Joseph Champion, was in violation of the court's previous discovery order. As sanction for this violation, the court dismissed Mrs. Champion's complaint, but also dismissed the claim of Guys & Dolls, Inc., and of Mrs. Champion, as well.

Guys and Dolls, Inc., and Mrs. Champion petitioned the court to vacate the judgment against them, on the grounds that they had been wrongfully made to suffer for the violations of the third plaintiff, Mr. Champion. The lower court agreed, and granted the motion to vacate, as to both the claim of Guys and Dolls, Inc., and the claim of Mrs. Champion. The court, however, enjoined Mr. Champion alone from presenting any evidence at trial.

The Defendants, on 17 March 1987, moved for Summary judgment. In support of their motion, they cited the previous ruling that Mr. Champion could present no evidence, and attached a transcript of Mrs. Champion's deposition, which, they arqued, showed that the Plaintiff could not produce any evidence to support their claim. The Defendants also

attached an affidavit by one Major Crump, an officer of the Prince George's County Police Department, asserting in conclusory terms that Prince George's County had no custom or policy to interfere with the business of Guys & Dolls, Inc. The Defendants mentioned in passing that they had executed answers to interrogatories rejecting the claims of the Plaintiff, but these pleadings were never made part of the record.

Plaintiff Guys & Dolls, Inc., opposed the motion for Summary Judgment on the grounds that the Plaintiff's affidavit was insufficient to support such a motion, that Mrs. Champion's deposition established the existence of a dispute as to material fact, and that Summary judgment was inappropriate where the Defendants refused to attend depositions scheduled by the Plaintiff Guys

& Dolls. In addition, Plaintiff Guys & Dolls filed an opposition to the Defendant's Motion for Protective Order, on the grounds that one Plaintiff's discovery sanctions should not be visited upon another, blameless plaintiff.

The lower court granted the Defendants' Motion for Protective Order nunc pro tunc, on 16 April 1987 without discussion of the issue raised by Guys & Dolls, Inc. The court also found that Mrs. Champion's evidence would not be sufficient to withstand a Motion for Directed Verdict, and that since Mr. Champion could not produce any evidence, the Plaintiff Guys & Dolls, Inc., could not prove its case.

BASIS OF JURISDICTION OF THE COURT OF FIRST INSTANCE

28 U.S.C. 1331 confers upon the District Court for the District of Maryland the jurisdiction to try cases, such as the instant case, which involve questions of federal law. The instant case involves the application of 42 U.S.C. 1983.

ARGUMENT

A. SUMMARY

This case cannot b
resolving the question
Supreme Court's decisio
Catrett, 106 S. Ct. 2548
tension between Justice
opinion and Justice Bren
the one hand, and J
opinion for the majority,
burden of the movant for
apparently evolved in Cel
burden once imposed by
Adickes v. S.H. Kress &
90 S. Ct. 1598, 26 L. Ed.
a lighter, less subst
Whereas in Adickes, supr
the burden of coming forw
of the absence of any
material fact, the Celot

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(1986). There is a
White's concurring
nan's dissent, on
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on the other. The
summary judgment
otex from the heavy
the decision of
Co., 398 U.S. 144,
2d. 142 (1970), to
antial obligation.
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genuine issues of
ex majority opinion

cautions that the Adickes opinion should not be construed "to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the proving party may be discharged by showing that is, pointing out to the District Court that there is an absence of evidence to support the nonmoving party's case." Celotex, supra, 106 S.Ct. 2548, at 2554.

Justice White, however, while concurring in the majority opinion, cautions that the movant must properly support its motion for summary judgment, and not rely on mere pleadings or blanket denials of a Plaintiffs' claim:

"the movant must discharge the burden the rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the Plaintiff has no evidence to prove his case.

A Plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the Defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine of material fact. "Celotex v. Catrett, 106 S. Ct. 2548, at 2556 (1986) (J. White, concerning).

Justice Brennan, too, reminds the

majority that the movant may not put the non-moving party to its proof by a mere assertion that no genuine dispute as to material fact exists:

> This burden has two distinct components: an inital burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. Celotex v. Catrett, 106 S. Ct. 2548, at 2556 (1986) (Brennan, Jr., dissenting).

> "Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party who will bear the burden of persuasion at trial has no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See ante, at 2551 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground

> that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. Ante, at 2553. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence." Celotex vs. Catrett, 106 S. Ct. 2548, at 2557 (1986), (Brennan, J., dissenting).

But while none of the three opinions admit that a break with the Adickes precedent has occurred, the Federal circuits have read Celotex to involve a departure from Adickes along the same lines of difference as exist between the Celotex majority opinion and both Brennan's dissent and White's concurring opinion. "This is at least a break in tone with prior law, under which summary judgment was understood to be a drastic remedy which may not be granted where there is the slightest doubt as to the facts" J.E. Mamiye & Sons, Inc., v. Fidelity Bank, 813 F. 2d. 610 (3rd Cir.

1987). The circuits generaly construe Celotex to mean that the movant need no longer negate the non-moving party's claim or defense, but need only point to gaps in the evidence on record so far. See Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F. 2d 211 (4th Cir. 1987); Apex Oil Co. vs. DiMauvo, 822 F. 2d 246 (2nd Cir. 1987); Fonteno v. Upjohn Co., 780 F. 2d 1190 (5th Cir. 1986). Logically, then, a movant could force its opponent to depose its witnesses in order to survive a motion for summary judgment, where little previous discovery had occurred on the record. This is a result that the majority in Celotex disavows, yet it is the result of the Celotex holding, unless the language in the Brennan and White opinions in Celotex property explain the majority opinion as

requiring that the movant negate the opposing parties claims.

In the instant case, the Defendant's Motion for Summary Judgment, including its attachments, was clearly insufficient to establish the absence of a dispute as to material fact. The attached affidavit was a conclusory negation of one element of Guys and Dolls' claim against the Defendant Prince George's County. The affidavit bore no relation to Guys & Dolls claims against individual police officers. The affidavit was not properly verified, and did not establish the basis of the affiant's alleged personal knowledge. The Defendants could not point to any of the pleadings to negate the claims of Guys and Dolls., and did not meet their heavy burden to show that the Plaintiff Guys and Dolls could not prove its

claim. Indeed, the transcript of Mrs. Champion's deposition, appended to the Defendant's Motion, was enough to establish the existence of a dispute as to material facts.

In addition, it was not appropriate for the court to grant Summary Judgment following its refusal to permit the Plaintiff Guys and Dolls to depose the Defendants. And finally, the Protective Order was erroneously issued, since the court applied a sanction to one Plaintiff, Guys and Dolls, Inc., for the discovery violation of another Plaintiff, Joseph Champion.

3. THE INSUFFICIENCY OF THE AFFIDAVIT AND ATTACHMENTS

The party seeking Summary Judgment "always bears the initial responsibility of informing the District Court of the basis for its Motion, and indentifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 91 L. Ed. 2d. 265, at 274, (1986). As the Defendants did not attach to their motion, or otherwise make part of the record, any answers to interrogatories or admissions on file, their motion must stand or fall on the affidavit and the deposition transcript that were attached.

The Affidavit is here quoted in its entirety:

AFFIDAVIT

I, Milton M. Crump, do hereby declare and affirm, under the penalties of perjury, that the following statements are true and correct, to the best of my knowledge, information and belief, and that I am an adult citizen, resident of the State of Maryland, competent to testify in a court of law.

1. I am presently employed by Prince George's County, Maryland as Executive Assistant to the Chief of Police, designated by the rank of Major in the Police Department.

2. I have reviewed the personnel roster of the Prince George's County Police Department, and state that Lt. Wallace Andrzejewski, Officer James House, Officer Wayne McBride, Officer Philip Mendez, Officer Charles Montgomery, Cpl. Howard Eugene Shook, Officer Paul Wedge and Officer William Whigham are presently employed by Prince George's County, Maryland as police officers; that Virginia Gambriel, William Kreutzer, John Lew, and Chief John McHale are all

retired former officers of the Prince George's County Police Department.

3. It was not and is not the policy or custom, official or unofficial, of Prince George's County, Maryland and its Police Department to arrest anyone without probable cause, or for fictitious charges; to impound vehicles without legal justification; or to impede the lawful pursuits of any persons without just cause.

4. It was not and is not the policy or custom, official or unofficial, of Prince George's County, Maryland and its Police Department to interfere with the lawful business of Guys and Dolls, Inc., or the patronage of its law-abiding customers.

5. It was not and is not the policy or custom, official or unofficial, of Prince George's County, Maryland and its Police Department to refrain from responding to calls for police assistance at the premises of Guys and Dolls, Inc.

Major Crump's affidavit doesnot mention or negate the specific allegations made in

the Plaintiff's complaint against perticular officers. The affidavit, therefore, is not of any use to the Plaintiff's claim against the individual defendants. Only Mrs. Champion's transcript may be used to Support the Defendants' Motion in that regard. The affidavit is concerned only with custom or policy of the County Defendant, and is aimed at negating one element of Guys & Dolls' claim against the County under 42 U.S.C. 1983. Monell Dept. of Social Services, 436 U.S. 658 (1978).

The affidavit of Major Crump has no probative value, as it is a conclusory and self-serving statement. Benton-Volve Metairie, Inc. v. Volve Southwest, Inc., 479 F. 2d. 135 at 138, 139 (5th cir., 1973). It consists of an opinion on an ultimate fact-custom or policy-and is also therefore of no

See Olymic Junior, Inc., Crystal, Inc. 463 F. 2d 1141, at 1146 (3rd Cir. 1972).

The affidavit does not clearly establish the basis of the affiant's purported knowledge. It does not even establish whether the affiant was employed by the Defendant county during the relevant period (1980-85), or whether he was otherwise in a position to know what the ustom or policy of the County was. Without showing of the basis for his purported wledge, the affiant's unsubstantiated rtions are valueless. See Liberty in Concerned Parents v. Keystone Cent. District, 81 FRD 590, V at 604 (MD 78); FRCP 56 (e).

affidavit, furthermore, was not ore an authorized officer, but was

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only verified by the affiant "under the penalties of perjury," and should therefore be disregarded. United Rubber, etc. v. Kirkhill Rubber Co., 367 F. 2d 956 (9th cir. 1966).

The burden is on the moving party to establish that there is no genuine issue as to material fact, and it is a heavy burden. Percival v. General Motors Corp., 539 F. 2d 1126 (8th Cir., 1976). the court should not lightly deprive a party of its right to trial.

Because the Defendants did not meet that heavy burden, Guys and Dolls, Inc., was not obligated to present any evidence, or affidavits. Adickes v. S.H. Kress & Co., 398 U.S. 144, 26a. Ed. 2d. 142, 90 S. CT. 1598 (1970); Gray v. Grey hound Lines, East, 545 F. 2d 169 at 174 (1976). Summary

Judgment was not appropriate here, even though Guys & Dolls did not file opposing affidavits, since the Crump Affidavit was not sufficient on its face to demonstrate the absence of material issues of fact. Adickes, supra; Gray, supra; Drexel v. Union Prescription Centers, Inc., 582 F. 2d 731, at 789-90, (1978). Justice White's concurring opinion in Celotex summarizes this position:

> The movant must discharge the burden the rules place upon him: It is not enough to move for Summary Judgment without supporting the motion in any way or with a conclusory assertion that the Plaintiff has no evidence to prove his case.
>
> A Plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat

> a Summary Judgment Motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.
>
> Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow that the named witness' possible testimony raises no genuine issue of material fact. Celotex v. Catrett, 91 L. Ed. 2d. 265, at 277 (1986) (White, J., concurring op.)

Clearly, then, it was erroneous to grant Summary Judgment as to Guys & Dolls' claim against the Defendant County, since the Defendants' Motion rested upon a single, conclusory, self-serving, unsubstantiated, and improperly executed affidavit. As for Guys and Dolls' claims against the individual officers, summary judgment was also improper. The Defendants could not point to the transcript of Mrs. Champion's

deposition. However, a brief review of the statements she made in that deposition is enough to show some basis for the Plantiff's claim.

On pages 33-39 of the deposition she indicates some knowledge of the conspiracy alleged:

> "Q. Do you know of any individual who was arrested by a Prince George's County police officer who was given the opportunity to have his charges dropped if he gave evidence against you or your husband?
>
> "A. Yes, I know.
>
> "Q. Who?
>
> "A. Richard Sanders.
>
> "Q. Who is Richard Sanders?
>
> "A. He worked for us, but not on a steady basis.
>
> ...
>
> "A....Yeah, this is what happened. He was in a car that was nothis own. It was a friend's. The police stopped him and discovered drugs in the car. He didn't know

anything about the drugs in the car. He didn't know anything about the drugs in the car.

"Q. That is what he told you?

"A. That is what he told us. And the police-he had to go to the station, the station house. Let me think next what happened. Something about if he would rat on Joe, that he could get out of this problem that he was in with the drugs"

...

"A. Yes. See, the police used topark across the street and watch the place over in the hotel parking lot, or they would park across the street in what is now a laundry, cleaners, area. And they would sit there for hours watching the people come and go out of there. They would stop people periodically, like daily, two and three times a day, for menial things like lights out or not making a turn signal. But they constantly sat over across the street."

Mrs. Champion indicates that she was told of the conspiracy alleged by one of the conspirators, on page 82 of the deposition:

"When we first took over the

> poolroom it was three days after we took it over I was standing behind the counter and a police officer approached me and told me he was going to shut the place down."

And finally, Mrs. Champion singles out one of the Defendant's, McBride, for his activities:

> "I remember alot about McBride was the one, like I say, who was staying in the lot all the time and harassing the customers coming in and out."

Mrs. Champion's deposition does not negate the claims of Guys and Dolls against the individual officers. In the absence of any depositions, interrogatories, affdavits, or admissions which negate the Plaintiff' claim, the individual Defendants must rely upon their answers to the complaint. This is clearly not enough to warrant Summary Judgment. Adickes, supra; Celetox, supra. The Defendants did not discharge their heavy

burden; they failed to make a showing that there exists no genuine dispute as to material fact.

Since neither Crump's Affidavit nor Champion's deposition effectively negate the Plaintiff's claim, the Defendant's motion for Summary Judgment is reduced to a blanket denial of Guys and Dolls allegations. It is merely a gauntlet thrown in a battle of the pleadings: The answers versus the complaint. Summary judgment is not appropriate under such circumstances.

C. THE ABILITY OF GUYS & DOLLS TO PRODUCE EVIDENCE

The lower court concluded that the Plaintiff Guys & Dolls Inc., could produce no evidence to support its claim, since Mr. Champion was enjoined from producing evidence at trial, and Mrs. Champion was, in the Court's opinion, of no help to the Plaintiff. The Champions however, do not constitute an exhaustive list of the sources of Guys & Dolls' evidence.

The court noted that all defendants believed that Joe Champion was crucial to Guys & Dolls case. This theory draws no support from the pleadings. A review of the Third Amended Complaint does not confirm any such theory. Some nieteen civilian witnesses are named. Had the Defendants shown that those witnesses could not produce evidence at trial, the Motion for Summary

Judgment would lie.

The Plaintiff Guys & Dolls was under no obligation to depose those nineteen witnesses or file their affidavits, because the burden never shifted from the movant Defendants. Adickes, supra, Celotex, supra; Gray, supra. The use of summary judgment motions to force discovery is clearly not contemplated by FRCP 56. The Defendants could have learned of Guys and Dolls' case by availing themselves of the normal discovery device was directed at Guys and Dolls. Nor were any of the nineteen civilian witnesses deposed by any of the defendants.

The court's conclusion that Guys and Dolls could present no evidence was, furthermore, improper in a tort case involving issues of credibility, Morrison v. Nissan Motor Co. 601 F 2d 139 (4th Cir.

MD 1979), and issues involving constitutional rights. Hess v. Schlesinger, 486 F. 2d 1311 (D.C. App. 1973).

D. CONSEQUENCES OF THE PROTECTIVE ORDER

Regardless of the propriety of the issuance of the Protective Order against Guys and Dolls, it was clearly erroneous for the lower court to enter summary judgment against Guys and Dolls after such an order was passed.

The Defendants never pursued discovery of the Plaintiff Guys and Dolls' claim; but once they had obtained a protective order preventing Guys and Dolls from deposing the Defendants, they filed a Motion for Summary Judgment based on Guys and Dolls' supposed inability to produce evidence. It is remarkable that the lower court accepted the logic of the Defendants' Motion. For even if the Defendants' attachments effectively had negated Guys & Dolls' claim, and the burden had thereby shifted to Guys & Dolls,

summary judgment would still ave been improper because Guys & Dolls had been denied discovery. Umdenstock v. American Mortg. & Invest. Co., 495 F. 2d 589 (10th Cir., 1974); See Kinee v. Abraham Lincoln Federal Sav. & Loan Ass'n., 365 F. Supp. 975 (ED Pa 1973).

E. THE ERRONEOUS PROTECTIVE ORDER

Nothing in the Federal Rules of Civil Protective permits a court to impose sanctions against one party for the discovery violation of another. FRCP 37, entitled "Failure to Make or Cooperate in Discovery: Sanctions," does not confer any such authority.

A review of the Defendant's Motion for protective order, filed on 12 Dec. 1987, reveals that all of the defendants' allegations of discovery violations involve the plaintiff Joe Champion. None of the violation were attributed to plaintiff Guys and Dolls. Yet the court's Order granting the Motion for Protective Order, of 16 April 1987, applies to Guys and Dolls. No logic can support this result. Nor can any argument justify the Defendants' failure to

appear at depositions scheduled by Guys and Dolls. It was clearly erroneous for the court to punish Guys and Dolls, Inc., for the discovery violation of another Plaintiff, and then enter judgment against Guys and Dolls because it could not purge itself.

F. CONCLUSION

For any or all of the four independently sufficient reasons set forth above, the judgment of the lower court against Guys and Dolls, Inc., must be reversed and remanded for trial and further pre-trial discovery.

Respectfully Submitted,

Roy Tesler

Tesler & Werbloor
113 Rowell Court
Falls Church, VA 22046
(703) 534-9300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoinf were mailed, postage prepaid, to Sherrie L. Krauser, Esq.,the Associate County Attorney of the Prince George's County, Maryland, Room 5121, County Administration Building, Upper Marlboro, Maryland 20772.

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Roy Tesler
(Member of the Bar of the Supreme Court)

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1619

GUYS & DOLLS BILLARDS, INC.,

Plaintiff-Appellant

and

JOSEPH CHAMPION;
KAY CHAMPION,

Plaintiffs

versus

JOHN E. McHALE, JR., et al.,

Defendants-Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-84-3859-JFM)

Argued: March 11, 1988 - Decided April 18, 1988

Before WINTER, Chief Judge, and MURNAGHAN and WILKINSON, Circuit Judges.

George Harper (Sullivan, Harper & Lahey on brief) for Appellant; Sherrie L. Krauser for Appellee.

PER CURIAM:

Guys & Dolls Billards, Inc. appeals the entry of a protective order and summary judgment against it in a 42 U.S.C. 1983 suit against Prince George's County, Maryland, and several of the county's police officers. We affirm.

I.

Plaintiffs Guys & Dolls, a bar and billard parlor, and its owners, Joseph and Kay Champion, filed a 42 U.S.C. 1983 claim against twelve named and twenty unnamed officers of the Prince George's County, Maryland, police, and against the county itself. Plaintiffs alleged numerous constitutional complaints, all of which amounted to the allegation that the Prince George's County police were harassing Guys & Dolls in an attempt to shut it down. Guys &

Dolls' complaint listed nineteen witnesses to the alleged police misconduct.

During the course of discovery, the officers propounded a number of interrogatories to Mr. Champion, who was the active operator of Guys & Dolls, concerning essentially all of the facts on which the complaint was based. Mr. Champion failed to respond to the requests, despite the entry of a court order. On December 8, 1986, it was learned that a set of answers later received by the defendants was never seen, signed, or verified by Champion, in violation of Fed. R. Civ. P. 33(a). On December 12, the defendants filed a motion for a protective order relieving the defendants from attending depositions requested by the plaintiffs and a motion for dismissal of the plaintiffs' suit. The

defendants refused to attend further depositions requested by the plaintiffs.

On January 6, 1988, the district court found that Mr. Champion was in violation of its previous discovery orders, and as a sanction dismissed the suit of Mr. Champion, Mrs. Champion, and Guys & Dolls. Mrs. Champion and Guys & Dolls petitioned the court to vacate the dismissal. On February 20, the district court agreed to reinstate the claims of Mrs. Champion and Guys & Dolls, but enjoined Mr. Champion from presenting any evidence in the case as to matters covered by the unanswered interrogatories. This order essentially prevents Mr. Champion from presenting any evidence whatsoever. No challenge to the order preventing Champion from presenting evidence has been made.

The defendants moved for summary judgment on March 17. They first stated that Mrs. Champion's claim must be dismissed because she alleged no violation of her individual rights, and lacked standing to sue in its own behalf. Defendants also argued that because the court had foreclosed testimony from Mr. Champion, the plaintiffs would not be able to present sufficient evidence in support of their claims to reach a jury. They referred to Mrs. Champion's deposition to show that her recollections of the events in the case were vague, and that she could provide no specific support for allegations that would support recovery. In addition, defendants attached an affidavit from an officer of the P.G. County police, who was not a party, stating that it was not a custom or policy of the department to

harass or interfere with Guys & Dolls. Defendants thus argued that plaintiffs would be unable to produce the specific allegations against named officers and the evidence of a custom or policy that would be needed to go to the jury against either the officers or the county.

Plaintiffs responded by stating that the police officer's affidavit was self-serving, that Mrs. Champion's deposition answers themselves were sufficient to take the case to the jury (but cited no specific parts of the deposition in support of this claim), and that summary judgment would be premature because the plaintiffs had not been able to complete the depositions. Plaintiffs did not assert that they could bring witnesses other than Mrs. Champion in support of their claims, nor did they attach

any affidavits in opposition to the summary judgment motion.

The district court first granted the motion for a protective order that was still before it nunc pro tunc, noting that plaintiffs had failed to respond to the December 1986 motion until March 30, 1987. The court then granted summary judgment on the basis of the defendants' argument described above. Plaintiffs appeal.

As an initial matter, the district court properly dismissed Mrs. Champion's claim. Mrs. Champion alleges no violation of her individual rights, but claim only in her capacity as a shareholder of Guys & Dolls. It is a settled principle of corporate law that shareholders in Mrs. Champion's position lack standing to sue. Guys & Dolls, as a corporate entity, is

entitled to bring suit in this situation, and Mrs. Champion may not herself sue as a shareholder. See, e.g., State Deposit Insurance Fund, 521 A.2d 1205, 1211 (Md. 1987); Waller v. Waller, 49 A.2d 449, 452 (Md. 1946). For this reason we treat the contentions in this appeal as those of Guys & Dolls alone.

III.

Guys & Dolls first challenges the district court's entry of the protective order. It argues that all of the discovery violations in the case were the fault of Mr. Champion, and that it was therefore an abuse of discretion for the district court to enter a protective order affecting Guys & Dolls. This argument fails for two reasons.

First, Mr. Champion is owner, president and manager of Guys & Dolls, and was also a

party to the suit. For this reason, his interrogatory answers could properly serve for himself and Guys & Dolls, Guys & Dolls is a corporate entity, and its participation in the discovery process was through Mr. Champion. Where a corporate officer commits discovery defaults, it is not an abuse of discretion for the court to impose sanctions on the corporation. See Fed. R. Civ. P. 37(d) (failure of officer or director to answer interrogatories justifies imposition of full range of Rule 37 sanctions); General Dynamics Corp v. Selb Manufacturing Co., 481 F.2d 1204 (8th Cir. 1973). In view of the egregoius disregard of the discovery rules and orders that appears on the record, we decline to disturb the district court's ruling on this matter.

There is a second and even more basic

reason why Guys & Dolls' argument must fail. Guys & Dolls did not file an opposition to the motion for protective order until threee months after the deadline for such an opposition passed. The district court could thus treat the motion as unoppposed. In such circumstances it could hardly be an abuse of discretion for the district court to grant the motion.

IV.

We turn next to Guys & Dolls' challenge to the entry of summary judgment. Guys & Dolls contends that material factual disputes preclude the entry of summary judgment in defendant's favor. We disagrre.

Summary Judgment will lie if, after discovery, it appears on motion that the party bearing the burden of proof on an essential element will be unable to produce

proof sufficient to establish the existence of the element. E.g., Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552-54 (1986). Examination of Mrs. Champion's deposition leaves no doubt that her testimony alone would not, if believed, have been sufficient to take any of Guys & Dolls' claims to a jury. Her allegations are cast in the vaguest possible terms. In almost every instance where Mrs. Champion was asked to back her allegations with specific knowledge, her response was "I don't know." Guys & Dolls argues that Mr. Champion's inability to provide a factual basis for the lawsuit does not support the award of summary judgment because if could have called other witnesses to support its claims, including the nineteen witnesses named in the complaint. Guys & Dolls

produced no affidavits from these witnesses, however, and indeed did not even mention their potential availability in the opposition to the summary judgment motion. Celotex makes clear that a party cannot "rest on its pleadings" in this way. See 106 S. Ct. at 2554; Fed. R. Civ. P. 56(e). Guys & Dolls would have us find issues of material fact on appeal through information that was never properly presented to the district court. We decline to follow a course that is so clearly at odds with the efficient resolution of disputes that summary judgment is intended to foster.

Finally, Guys & Dolls asserts that summary judgment was inappropriate in light of the fact that it had not been able to depose the defendants. It is true that summary judgment should only be granted

after a sufficient opportunity for discovery, e.g., Celotex, supra. The district court, however, granted the protective order nunc pro tunc. The opportunity fir discovery contemplated by Celotex obviously does not include discovery that might once have been appropriate but was forbidden by a protective order. A lack of discovery that resulted from a valid protective order provides no basis for Guys & Dolls' attempt to escape summary judgment.

The judgment of the district court is in all respects.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. JFM-84-3859

JOSEPH CHAMPION, et al.,

Appellant,

versus

JOHN McHALE, JR., et al.,

Appellee.

Opinion of District Court for the
District of Maryland

Submitted: April 16, 1987 by J. Frederick Motz, United States District Judge.

MEMORANDUM:

On January 6, 1987 this Court entered an order of judgment dismissing this action for discovery defaults committed by Joseph Champion. On February 20, 1987 this Court entered an order modifying the January 6th order (1) dismissing the action only against Joseph Champion, (2) reinstating the claims of plaintiffs Guys & Dolls Billards, Inc. and Kay Champion, and (3) precluding Mr. Champion from introducing into evidence any matters covered by the interrogatories propounded to him. The reason for this modification of the January 6th order was that the discovery requests to which Mr. Champion had failed to respond technically were directed only to him and not to Guys & Dolls or Kay Champion, his wife.

Presently pending before the Court are two motions filed by defendants: one for a

protective order and the other for summary judgment as to the claims of Guys & Dolls and Kay Champion. Both motions will be granted.

The motion for protective order was filed in December 1986 as a result of Joseph Champion's failure to comply with discovery rules and orders. Plaintiffs did not respond to the motion until March 30, 1987, when they responded to defendants' motion for summary judgment. Defendants clearly were entitled to the protective order and their motion is granted nunc pro tunc.

Defendants assert several grounds for thier summary judgment motion.

First, defendant contend that Kay Champion alleges no violation of her individual rights but, rather, is suing only in her capacity as shareholder and officer of Guys & Dolls. Plaintiffs do not deny

that contention, and it is clear that in that capacity Kay Champion has no standing to bring this action. See, eg., Commercial Credit Business Loans, Inc. v. Martin, 590 F. Supp. 328 (E.D. Pa. 1984); Waller v. Waller, 187 Md. 185, 49 A.2d 449 (1946).

Second, defendant William Whigham points out that no specific allegations are made against him in the third amended complaint and that since it is now far too late for plaintiffs to amend their complaint, he is entitled to judgment as a matter of law. This contention is unassailed and unassailable.

Third, all defendants contend that the testimony of Joseph Champion concerning defendants' alleged wrongdoing is critical to the claims asserted by Guys & Dolls and that, since Joseph Champion is precluded by this Court's order from testifying at trial,

Guys & Dolls will be unable to prove its case. Again, the contention is well-founded. Plaintiffs argue that the trial testimony of Kay Champion, as anticipated by her answers on deposition, is sufficient to take the case to the jury. However, plaintiffs submitted no affidavit by Mrs. Champion and cited no specific deposition testimony to support that contention. Defendnts, on the other hand, have pointed out specific answers given by Mrs. Champion in her deposition that establish that she can recall no specific complaints against any of the individual defendants. Further, the vague generalities which she does recall clearly would not be sufficient to establish a custom, practice or policy of the County. Because her evidence would not be sufficient to withstand a motion for directed verdict, summary judgment is proper. See, e.g.,

Celotex Corp v. Catreet, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986).

A separate order effecting the rulings made in this memorandum is being entered herewith.